1964

State of Utah v. Vernon Howard Cannon : Brief of Respondent

Utah Supreme Court

Barker & Ryberg; Attorneys for Defendant-Appellant;
Honorable A. Pratt Kesler; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,

— vs. —

VERNON HOWARD CANNON,
Defendant-Appellant.

Case No. 10187

BRIEF OF RESPONDENT

Appeal From the Judgment of the Third Judicial
District Court for Salt Lake County, State of Utah
Hon. Merrill C. Faux, *Judge*

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant Attorney General
State Capitol
Salt Lake City, Utah
Attorneys for Respondent

BARKER & RYBERG
68 East 21st South Street
Salt Lake City, Utah
Attorneys for Appellant

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IN THE SUPREME COURT
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STATE OF UTAH

STATE OF UTAH,
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— vs. —

VERNON HOWARD CANNON,
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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

The appellant appeals, challenging his conviction to the crime of automobile homicide in violation of 76–30–7.4, Utah Code Annotated 1953.

DISPOSITION IN LOWER COURT

The appellant was tried by jury trial on the crime charged in the information, to-wit: automobile homicide. The jury returned a verdict of guilty as charged.

RELIEF SOUGHT ON APPEAL

The respondent, State of Utah, submits the conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts: The appellant, Vernon Howard Cannon, was charged

with the crime of automobile homicide in that it was alleged that the appellant operated his motor vehicle while intoxicated, resulting in the death of Fleming Christensen. The evidence disclosed that the appellant, Vernon Howard Cannon, 54, was the co-owner with a Mr. Robert E. Lee of the Parley's Canyon Cafe located above Mountain Dell Reservoir in Salt Lake County (R. 194, 195, 226). On the night of the 21st of October, 1963, Cannon left his usual employment and went to the Parley's Canyon Cafe at approximately 6:00 P.M. (R. 230). Subsequently, he and Mr. Lee made a journey in search of an employee of the cafe and went to Keetley, Park City, Kimball's Junction, Fort Ute, and returned to the cafe at approximately 8:10 P.M. (R. 197–200). Thereafter, Mr. Cannon ate in the trailer of Mr. Lee, had some coffee and then started down Parley's Canyon (R. 202, 203).

Franklin Lester Hewlett, Fleming Christensen and Gary F. Barrus had been playing basketball and visiting friends (R. 94) and were driving home in a Morris Miner Station Wagon being driven by the Hewlett boy. All three boys were 17 years of age (R. 93). Fleming Christensen was sitting in the front seat opposite the driver and Gary Barrus was sitting in the rear seat behind the Hewlett boy (R. 93–94). They headed north on Wasatch Boulevard and stopped at the intersection of 33rd South and Wasatch Boulevard for a stoplight (R. 94, 98, 106). As the light changed, the three boys proceeded north on Wasatch Boulevard and pulled into the outside right-hand lane (R. 98). Wasatch Boulevard is a four lane highway with two lanes each way and the road dips between 33rd South and the Parley's Canyon Interchange. Each lane on one side is separated by dotted white lines (R. 69) and two wide yellow lines

separate the opposing lanes of traffic (R. 68). The road is blacktopped and there are semaphores at 33rd South on the south and the Parley's Canyon Interchange on the north (R. 70). As the Morris Miner vehicle proceeded north on Wasatch Boulevard, the appellant, operating a 1961 Chevrolet, drove down Parley's Canyon, stopped at the semaphore at the Parley's Canyon Interchange with Wasatch Boulevard (R. 233) and proceeded south on Wasatch Boulevard. The appellant's vehicle appeared to stop at the dip between the interchange and 33rd South and head off toward the west outside lane of traffic (R. 112). Appellant then started up, crossed east into the south lane of traffic and made several directional changes back and forth in an apparent effort to correct himself (R. 113). The vehicle then started to accelerate rapidly up the hill, looked like it was going to hit a grain truck which was also proceeding south on Wasatch Boulevard, then veered across the double line into the northbound lane of traffic, striking the Morris Miner Station Wagon head-on (R. 95, 98, 113, 114). As a result of the collision, Fleming Christensen and Franklin Hewlett were killed (R. 117). Gary Barrus sustained injuries and was knocked unconscious (R. 95). Immediately after the accident, Mr. George W. Golightly, who observed the accident, went to the Chevrolet which the appellant had been driving to offer assistance (R. 100). He detected an odor of alcohol on the appellant's breath (R. 101) and indicated that the appellant appeared in shock (R. 105).

The impact of the collision caused both vehicles to change direction so that when they came to rest, the Chevrolet was pointing north and the Morris Miner Station Wagon, which had been knocked on its side, was pointing south (Exhibits 7, 8, 9, 12). A 40-foot skid mark from the

rear wheel of the Chevrolet to the point of impact was measured by sheriff's officers (R. 77).

The appellant was taken to the Salt Lake County Hospital and at 11:54 p.m., approximately an hour and forty-four minutes after the accident, a blood sample was taken from the appellant by Dr. Burton Janis (R. 120, 124). The blood sample was taken by sterile syringe (R. 121) and the blood placed in a bottle provided by Officer Jack Retallick of the Salt Lake County Sheriff's office (R. 121, 123). Officer Retallick had obtained the vial from a cabinet in the County Hospital (R. 135). The vial appeared empty and after the blood was placed in it, it was sealed and taped (R. 137). Officer Retallick put the sample in his coat, took it home and placed it in his refrigerator and the next day, in the company of Officer VanRoosendaal, took the sample to the State Chemist's office (R. 140). Mr. H. Kent Francis, the State Chemist, performed the Harger blood alcohol test upon the blood sample and determined the percentage of alcohol to blood to be .193 per cent. The vial containing the blood was sealed at the time it was delivered to Dr. Francis (R. 148).

Dr. Stewart C. Harvey, a pharmacologist at the University of Utah Medical School, testified at the time of trial that the driving ability of most everyone would be impaired with a blood alcohol level of .10 (R. 169). He testified that it would take approximately 13 ounces of whiskey to raise a person's blood alcohol level to .193. He further indicated that the normal body processes burn up or metabolize approximately .015 to .030 per cent of alcohol per hour. He further indicated that, generally, absorption will be complete approximately one hour after consumption and that in order to ascertain the blood alcohol level at the time of an

accident, it is important to know when consumption occurred (R. 177).

The defendant offered the testimony of Mr. Robert E. Lee to the effect that he was with the appellant prior to the time that he drove down Parley's Canyon and was involved in the accident. He testified concerning the trip in search of their employee and indicated that during the trip the appellant had had coffee (R. 199) and that subsequently he ate beef stew and drank addditional coffee (R. 202, 203). Mr. Lee indicated that he had been drinking himself earlier in the evening and, therefore, could not smell alcohol on the breath of others (R. 207). He stated that it would have been possible for the appellant to have been drinking during the evening and he did not know whether the appellant had been drinking or not (R. 214, 216). He did not see the appellant take a drink during the time he was in his company. He testified, however, that he had "no idea" that the appellant "had consumed" liquor (R. 202, 204).

Theilda Lee, wife of Robert Lee, testified that she saw the appellant at the Parley's Canyon Cafe at approximately 6:00 P.M. and did not smell liquor on his breath. At no time did she see him take any liquor (R. 220). Subsequently, after returning from the trip with her husband, he ate with them and watched TV and she did not notice the appellant drinking nor smell alcohol on his breath.

The appellant admitted consuming part of a pint of whiskey, which he said was about one-half full, which was in his car. The appellant indicated that he drank the whiskey on the way down Parley's Canyon. He stated he stopped after leaving the restaurant at a point about three miles from the restaurant and five miles from the Parley's Interchange semaphore. He testified that he remembered stop-

ping at the semaphore, but did not remember anything thereafter. The alcohol he drank, he claimed, was 86 Proof. After the accident, he was of the opinion that he had gone to sleep and run off the road (R. 235), although he told police officers that he either fell asleep or "passed out" (R. 128). Dr. Gordon R. Evans testified that if eight ounces of 100 Proof alcohol had been consumed approximately ten to fifteen minutes before the accident, that the appellant would have had at the time of the accident a blood alcohol level of between .02 and .03. He further indicated that the appellant would have had good judgment had he merely had a mild dosage of alcohol absorption. He indicated that if eight ounces of 100 Proof alcohol were consumed, that the blood alcohol level after full absorption would be .191 (R. 252). However, the Doctor indicated that this computation did not take into consideration body metabolism or oxidation and that oxidation during the period of absorption would probably be .04 (R. 267).

The appellant's sister was called as a witness and testified that in March 1962, the appellant had had an illness which affected his inner ear (R. 191). The appellant himself testified that at that time he had "Meniere's disease." The disease he characterized as causing a loss of balance (R. 228). The disease lasted approximately three months (R. 229). Dr. Evans treated the appellant for the disease and also characterized the disease as causing the loss of balance, but indicated that it does not result in unconsciousness or an unawareness of what is occurring. He further testified that alcohol does not necessarily aggravate the disease (R. 256). He last saw the appelllant when treating him for the disease in October, 1962, approximately a year prior to the accident. Dr. D. C. Bernson testified that

he made a neurological examination of the appellant after the accident and was of the opinion that he had suffered a cerebral contusion which caused the loss of consciousness. He felt that, generally, someone who had had Meniere's disease would know that it was occurring. He indicated that there was no evidence of Meniere's disease having occurred, but that if it was not in progress, he would have been unable to detect its occurring (R. 286, 288). Subsequent to the completion of the testimony, the trial court struck all evidence relating to Meniere's disease.

Based upon the above evidence, the jury returned a verdict of guilty.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT COMMIT ERROR IN GRANTING THE STATE'S MOTION TO STRIKE THE EVIDENCE RELATING TO MENIERE'S DISEASE.

The appellant argues that the trial court erred in granting the State's motion to strike the evidence relating to the appellant having had Meniere's disease. The motion to strike was made at the end of the appellant's case and prior to the time the case was submitted to the jury. It is submitted that the basis upon which the appellant claims the court erred is without legal foundation. The evidence that had been received by the court relating to the appellant's affliction with Meniere's disease, it is submitted, was too remote and speculative to warrant the jury considering it and the court acted within its sound discretion in granting the State's motion to strike.

The appellant's sister, Harriett Snarr, testified that the appellant had had an illness which affected his inner ear and that the affliction had occurred in March, 1962. The

appellant himself did not testify with reference to suffering from Meniere's disease at the time of the accident. His testimony was to the effect that he had not suffered from the disease or sought medical attention since October, 1962, approximately one year prior to the time of the accident which occurred on October 21, 1963. Mr. and Mrs. Robert Lee, who were with the appellant in the hours immediately preceding the accident, gave no evidence in support of the proposition that the appellant was in any way suffering from Meniere's disease. The appellant's testimony was to the effect that he thought he had fallen asleep at the interchange light at Parley's Canyon and Wasatch Boulevard. At the time he was in the hospital, subsequent to the accident, he told the investigating officers that he either passed out or fell asleep. The examining physicians indicated that there was no evidence that the appellant was suffering from Meniere's disease at the time of the examination immediately subsequent to the accident. Dr. Gordon Evans, who treated the defendant for his affliction, described the disease as one involving the loss of balance, but indicated that unconsciousness did not result and that a person so afflicted is generally aware of what he is doing. The only evidence tending to support the appellant's claim of relevancy was that the disease was a chronic or recurrent disease which could occur after periods of lapse. Consequently, there was no affirmative evidence of the appellant having suffered the effects of Meniere's disease within a period of one year prior to the accident. There was no affirmative evidence of any kind that the appellant had suffered from Meniere's disease at the time of the accident. It would be speculation and inference upon inference to conclude that the accident had been caused by Meniere's disease. The appellant by his

own testimony evidenced no manifestations of the disease.

Evidence was offered at the trial that the appellant's memory was impeded by retrogressive amnesia. It would be necessary to support error to infer that:

1. The appellant's loss of consciousness did not in fact take place until after the accident.
2. That the chronic and recurrent disease which had not afflicted the appellant for over a year had suddenly struck him and that it had immediately subsided between the time of the accident and the time which he was examined at the hospital.

Further, it would be necessary to infer that the appellant had no recollection of any of the events which might have been precipitated by the disease.

The appellant's principle argument in support of his contention that the trial court erred in striking the evidence are legal arguments unrelated to the posture of this case. It is admitted that generally a motion to strike comes too late if it appears that the evidence, when offered on its face, is inadmissible. Further, it is admitted that a party may not usually avail himself of a motion to strike evidence which he offers. However, in this case, neither of these rules are applicable. The first evidence which came in unobjected to relating to Meniere's disease was evidence from the appellant's sister. Further, the evidence that appellant had in fact suffered from Meniere's disease, which was offered by the appellant himself, would appear to be relevant at first blush and would appear to be the type of evidence which would be connected up by other evidence tending to show its relationship to the event involved. The evidence, therefore, was not that type of evidence which at first blush would warrant the prosecution in opposing its receipt. However, after examination into the nature of the disease and

the facts surrounding the appellant's condition, it became apparent that there was no basis, except remote speculation, to warrant the evidence remaining before the jury. It appearing that the necessary connecting evidence had not come forth, a motion to strike was proper.

Secondly, the prosecution did not offer affirmative evidence of Meniere's disease which would preclude their making the motion to strike. The prosecution merely cross-examined one of the appellant's doctors concerning the pathology of the disease. The evidence offered in no way tended to remove the speculative and remote nature of the evidence then before the court. Consequently, it was apparent that at the end of the reception of the evidence, the testimony relating to Meniere's disease was of a remote and speculative nature. In such circumstances, it is within the sound discretion of the court to grant a motion to strike.

It is generally recognized that a motion to strike rests within the sound discretion of the court. See *State v. Lopez,* 55 N.M. 560, 237 P.2d 591. In 23A, C.J.S., *Criminal Law,* § 1069, p. 45, it is stated:

> "The grant or refusal of a motion to strike improper evidence may be viewed as a matter within the sound discretion of the court, as where the evidence was admitted without objection, see infra. § 1070. Thus a motion to strike evidence because of facts elicited on cross-examination showing it to be incompetent has been held to be discretionary with the court. Even though evidence may be considered technically relevant, if it is only remotely relevant to the main issues and might tend to lead the jury down a collateral issue or might tend to subject them to some prejudice, a proper exercise of judicial discretion may require that it be stricken."

Since the evidence in the instant case was substantially remote and since the appellant himself as well as the medical evidence offered tended to show that at no time surrounding the accident did he suffer from Meniere's syndrome, the trial court properly struck the evidence since it would tend to "lead the jury down a collateral issue." Further, it is well settled that the question of whether or not evidence should be received or considered by a jury when the evidence is remote to the issue at hand, is a matter within the sound discretion of the trial court. In *State v. Schuman,* 151 Kan. 749, 100 P.2d 706 (1940), the Kansas Supreme Court noted:

> "* * * A ruling on the competency of evidence, based upon remoteness, ordinarily rests in the discretion of the trial court and will not be reversed unless it clearly appears the ruling constituted an abuse of sound judicial discretion. * * *"

Numerous other cases support that statement, *State v. Jaynes*, 165 Ore. 321, 107 P.2d 528; *State v. Moore*, 35 Wash. 2d 106, 211 P.2d 172; *State v. Thomas*, 8 Wash. 2d 573, 113 P.2d 73; *Dickey v. State*, 97 Okla. Cr. 28, 257 P.2d 319; *People v. Bjornsen*, 79 Cal. 2d 519, 180 P.2d 443; *People v. Boggess,* 194 Cal. 212, 228 Pac. 448.

In *State v. Cody*, 361 P.2d 307 (Okla. Cr. 1961), the court noted that where the defendant sought to offer testimony of a doctor to show the prosecutrix's mental condition a few years before the occurrence of the crime was properly excluded as being too remote to have probative value. In *People v. MacArthur*, 125 Cal. App. 2d 212, 270 P.2d 37 (1954), the appellant contended it was error in cross-examining a State's witness for the court to exclude examination in a narcotics case as to appellant's lack of access. In rejecting the contention the court indicated:

> "* * * The trial judge has wide discretion in determining the relevancy of evidence, Spolter v. Four-Wheel Brake Service Co., 99 Cal.App.2d 690, 222 P.2d 307; Gladstone v. Fortier, 22 Cal.App.2d 1, 70 P.2d 255. Whether or not evidence is too remote is for the trial court which is vested with a wide discretion in making such decisions. * * *"

In *Butler v. State,* 352 S.W.2d 744 (Texas Crim. 1962), the defendant was convicted of driving while intoxicated. On appeal, he cited as error the failure of the court to allow hospital records into evidence which would show a physical condition of his stomach which would have been inconsistent with his drinking. The court ruled that the trial court properly exercised its discretion in excluding the evidence where the records reflected that the condition for which he was treated did not involve his hospitalization until some seven months after the accident. The court felt this was sufficiently remote to the charge to allow the trial court to exclude the evidence. In the instant case, the evidence was even further remote and there was additional evidence before the court tending to negative any inference that the previous condition had reoccurred at the time of the accident. See also 22A, C.J.S., *Criminal Law,* § 638. In 22A, C.J.S., *Criminal Law,* § 639, it is stated:

> "Evidence may be excluded when it is such as to furnish a basis for nothing more than a mere conjecture with reference to the transaction under investigation. * * *"

The appellant has called the court's attention to the case of *State v. Gooze,* 14 N.J. Supr. 277, 81 A.2d 811 (1951). That case in no way is relevant or of any precedent in favor of the appellant. There the defendant was convicted of negligent homicide and the conviction was affirmed on

appeal. There was no evidence of any alcohol or intoxication being involved. The defendant suffered from Meniere's syndrome and had been warned by his doctor not to drive. Thereafter, he did drive, had an attack resulting in the accident causing death. The appellate court confirmed the conviction on the grounds that the defendant's negligence in driving with Meniere's syndrome was sufficient to make his conduct criminal. A reading of the case clearly demonstrates the medical testimony offered in that case was different than in the instant case and the evidence was exclusively that the accident was caused by Meniere's syndrome. The case has no merit in this appeal.

Finally, it is submitted that the trial court acted properly in exercising its discretion to strike the evidence on the grounds that the appellant failed to connect the evidence relating to Meniere's syndrome to the circumstances of the accident. The testimony by all persons concerned would exclude the inferences that Meniere's syndrome could have been responsible for the appellant's conduct:

1. Persons who saw the appellant immediately preceding the accident detected no physical upset.
2. The appellant admitted the heavy consumption of alcohol.
3. Alcohol will not precipitate Meniere's syndrome although it may aggravate a loss of balance occurring during an attack of Meniere's syndrome.
4. The appellant's testimony was to the effect that he fell asleep.
5. His admission to the police officers was that he fell asleep or passed out.
6. There was no neurological evidence of the appellant having suffered from Meniere's syndrome.

7. Meniere's syndrome is not characterized by loss of consciousness which appeared to either result prior to the accident or as a result of the accident.
8. The last serious attack of the appellant of the disease occurred in March 1962 and he was last seen by his doctor in October, 1962, some one year prior to the accident.

As a consequence of the above factors, it is clear that the appellant failed to connect the evidence relating to Meniere's disease to the accident.

In Wigmore, *Evidence,* 3rd Ed., § 1871, it is noted that a motion to strike is a proper remedy to exclude evidence which the offering party has failed to connect up with the issues in the case. This motion may be made at any time, but is most appropriate at the end of the case where full opportunity has been given to demonstrate relevancy or materiality and there has been a failure in that regard.

It is obvious, therefore, that the trial court did not commit error nor abuse its discretion in striking from the record and from the jury's consideration the evidence relating to Meniere's disease.

POINT II

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE RESULTS OF THE APPELLANT'S BLOOD ALCOHOL TEST.

A. Accuracy of the Test.

The appellant challenges the admissibility of the results of his blood alcohol test on the grounds that there was no proper foundation laid and that it did not appear that the test was conducted under circumstances which would guarantee reasonable accuracy. A simple reading of the record discloses the manifest absurdity of such an allegation. At the outset, it should be noted that at the time Exhibits 1, 2

and 3 were offered which relate to the appellant's blood sample, an objection was raised but it was not made specific. No challenge was made to the lack of foundation or the remoteness of the exhibit in the objection made by the appellant's counsel. In *State v. Warren,* 75 Ariz. 123, 252 P.2d 781 (1953), the Arizona Supreme Court ruled that where an appellant had failed to make specific his objection to the receipt of chemical evidence indicating intoxication at the time of trial and where he sought to challenge the admissibility of such evidence because of the lack of reliability of the test and proper measures being taken to insure its accuracy, that the failure to specifically object and adequately state his grounds precluded consideration of the issue on appeal. It would appear that the appellant's point on this issue should fail for the same reason (R. 182).

An analysis of the record makes it manifest that the blood sample was properly taken from the appellant and appropriately handled by all persons, including the State Chemist who performed the test. Dr. Burton Janis took the blood sample from the defendant which he extracted with a prepared sterile syringe (R. 120, 121). He placed the blood in a bottle given to him by Officer Retallick who had obtained the bottle from a cabinet in the Salt Lake County Hospital which was available to sheriff personnel (R. 121, 125). The vial appeared empty and had no anti-coagulant (R. 123, 136). Officer Retallick sealed the bottle in which the blood was contained and placed his initials on the bottle (R. 137). The sample was kept in his possession overnight. He put it in his pocket after receiving it from the doctor, carried it home where he placed it in his refrigerator. Subsequently, he took the sample, along with Officer VanRoosendaal, to the State Chemist. The sample was still sealed when it was taken to the State Chemist's office (R.

140, 148). At the office of the State Chemist, H. Kent Francis, who had performed numerous tests using the Harger method for the detection of blood alcohol ratio, performed the same standard test. There was no evidence that the vial in which the appellant's blood was placed was contaminated with any substance which would impair the validity of the test. The procedures followed by Mr. Francis were standard procedures for determining the alcohol content in blood samples. There was no evidence that any of the chemicals used by the State Chemist were in any way diluted or contrary to standard specifications. Dr. Stewart Harvey, a pharmacologist called by the State, indicated that if an improper measure of dichromate was used in the process that any lack of reliability would immediately appear (R. 181). He further testified that there were a number of built-in processes in the Harger method for catching errors. The only evidence attacking the reliability of the test offered by the defendant was speculative evidence to the effect that if the chemical solutions were not properly measured or if the vial was contaminated, the results of the test might be affected. There was no evidence to show that either of these "ifs" had in fact any probability of occurrence. Consequently, there is absolutely no evidence which would tend to impeach the reliability of the test which was performed. In Wharton's *Criminal Evidence*, Vol. 2, § 665, p. 589, it is stated:

> "The specimen or object must have been kept in a proper manner after its removal from the defendant. This may be shown by proof of isolation of the object or specimen from other objects or specimens, or of the proper keeping of the package or container in which the object or specimen was kept. It has, however, been held that lack of the safeguards which might reason-

> ably be expected does not render the testimony or report inadmissible in the absence of any evidence tending to show tampering. * * *"

A number of cases support the view that blood alcohol samples are admissible after a showing that proper procedures were generally followed in the absence of affirmative evidence tending to impeach the reliability of the test.

In *State v. Webb,* 76 Ida. 162, 279 P.2d 634 (1955), the Idaho Supreme Court had before it a challenge to the admissibility of a blood test in a similar case. It appeared that the blood test was taken by medical technologists and that a proper laboratory analysis was made in the customary manner using a mixture of sulphuric acid and potassium bichromate. In denying the claim of error by the appellant, the Idaho Supreme Court stated:

> "There was nothing in the evidence which would even create a suspicion the blood was molested during the analysis or that anyone who might be interested in tampering with it had access to the hospital laboratory. State v. Smith, Mo., 222 S.W. 455; 21 A.L.R.2d 1223n, 1237n. We believe the evidence was properly admitted."

See also *State v. Coburn,* 82 Ida. 437, 354 P.2d 751; *State v. Wendler,* 83 Ida. 213, 364 P.2d 697.

The circumstances of this case should be compared with those in *Utah Farm Bureau Insurance Company v. Chugg,* 6 U.2d 399, 315 P.2d 277 (1957), where this court held a blood test inadmissible. In that case, the technician was unable to identify the sample, could not remember who drew the sample and the sample was neither sealed nor labeled. The court held that there was a lack of evidence to connect the blood sample with the defendant. In *Eisen-*

trager v. State, 378 P.2d 526 (Nev. 1963), the Nevada Supreme Court ruled that where there was no evidence to indicate that the blood sample taken from the appellant had been tampered with or otherwise contaminated, the evidence would be admitted.

Certainly there is a presumption of regularity when it is shown that regular procedures and standard chemicals are used. The fact that pre-mixed chemicals purchased from standard drug houses are used, should create an inference that the chemicals were of proper strength since the provisions of the Federal Food and Drug Law would prohibit the manufacture and labeling of such items if they were to the contrary. See Toulmin, *Food, Drugs, Cosmetics,* Vol. 3, § 5313 and the Drug Amendments Act of 1962. The appellant cites no case which would support his allegation that the blood test in this instance should not have been admitted. Indeed, no reasonable argument for this proposition can be sustained.

B. Remoteness.

The appellant contends that the trial court committed error in admitting the results of the appellant's blood alcohol test because the test was taken approximately an hour and forty-four minutes after the accident. It is submitted that there is no merit to the appellant's contention.

The basis of the argument is that the appellant's testimony was to the effect that he consumed a half pint of 86 Proof whiskey approximately fifteen minutes before the accident and that assuming this is so, the blood alcohol level of the appellant at the time of the accident would have been .02 to .03 per cent. It is submitted there are a variety of reasons why the trial court's ruling should not be disturbed. First, the jury had before it the evidence in support of the

appellant's contention that he had consumed only eight ounces (½ pint) of liquor within a fifteen minute period prior to the accident. They also had the testimony of the appellant's medical witnesses that if such were true, a blood alcohol level of .02 to .03 would have been the appellant's condition at the time of the accident. Consequently, the evidence of the blood alcohol test taken approximately an hour and forty-four minutes thereafter was fully explained from the appellant's point of view and the evidence admitted as to the level of .193 at the time of testing could have only gone to the weight to the test and not its admissibility. It is submitted, however, that there is ample evidence from which the jury could find that the appellant was not telling the truth when he said that he consumed the liquor within a period immediately preceding the accident. Dr. Stewart Harvey testified that the appellant would have had to consume approximately 13 ounces of liquor to raise his blood alcohol level to .193. Dr. Gordon Evans, who testified for the appellant, indicated that 8 ounces of 100 Proof alcohol (the appellant testified the whiskey he drank was 86 Proof) would have to be consumed to raise the blood alcohol to .191. However, Dr. Evans testified that if the blood alcohol level was .193 an hour and forty-four minutes after the accident, that body metabolism would have used up .04% alcohol at 100 Proof and that the appellant would have burned up that amount of alcohol. Consequently, the appellant would have had to consume an amount which would have raised his blood alcohol level without oxidation to .23%. Thus, it is apparent that the appellant must have consumed more liquor than what he admitted drinking. Since the appellant apparently lied as to this action, the jury could well have disregarded his total testimony. Further, the evidence of alcohol on the appellant's breath at the time

of the accident and his erratic driving behavior immediately preceding the accident would tend to report the finding that his level of consumption was greater than that of .02. Finally, the appellant's admission that he had fallen asleep or "passed out" would tend to support a conclusion that the appellant had in fact consumed enough alcohol to pass out. Aside from these factors, Mr. Robert Lee's testimony in several instances indicated that he had no idea that the appellant "had" consumed liquor which, although it might have been a slip of the tongue, could have indicated that Mr. Lee had some information that the appellant "had" consumed liquor (R. 202). Consequently, the jury was under no obligation, nor was the court, to assume that the appellant's contentions were the truth.

A number of cases have considered the issue as to whether a blood alcohol test taken a few hours after an accident should be admitted. Generally, they have allowed the evidence to be considered by the jury. Thus, Donigan, *Chemical Tests and the Law* (1957) notes:

> "In connection with persons operating motor vehicles while under the influence of intoxicants, it frequently happens that when they are apprehended while in the act or after they have been involved in traffic collisions, it is inconvenient or impossible for one reason or another to obtain specimens of their blood, urine, or breath for chemical analysis immediately after the event. Examples of reasons for delay are unavailability of the testing equipment or qualified personnel to take the specimen at the moment, the need sometimes to travel considerable distances before such tests can be conducted, necessity for responsible officers to investigate at the scene of the collision and to clear up its aftermath before giving full attention to the inebriated driver, or the hospitalization of an

injured subject before officers are able to request that he submit to a chemical test. This means that sometimes the taking of specimens of body fluid or breath for the purpose of chemical analyses may take place several hours after the act of driving in an impaired condition actually occurred.

"It is only logical that the sooner after the act the specimen is taken for analysis, the more accurate will be the estimate of blood alcohol concentration at the time of the act in issue. But because it could not be or was not done immediately after the event, does that mean the result of such a chemical test is inadmissible in subsequent litigation either civil or criminal? Our courts have answered in the negative, unless there are statutory time restrictions which otherwise control. In the reported decisions in which the issue has been raised, the lapse between the occurrence of the event and the time of taking of a specimen for analysis has ranged from one hour to four hours."

In *Toms v. State,* 95 Okla. Cr. 60, 239 P.2d 812 (1952), a collision occurred at 3:30 P.M. and urine and breath tests were taken at 5:00 P.M. The court upheld the admission of the tests. In *State v. Ayres,* 70 Ida. 18, 211 P.2d 142 (1949), the test was taken approximately three hours after the collision and the Idaho Supreme Court held the results admissible. See also *Bowden v. State,* 95 Okla. Cr. 382, 246 P.2d 427 (1952) (blood sample three hours after collision admitted) and *Wimsatt v. State,* 139 N.E.2d 903 (Ind. 1957) (breath specimen taken two hours after arrest allowed). Many courts have allowed the results of tests taken several hours after an incident to be admitted where there is evidence from which the jury could extrapolate the percentage of blood alcohol at the time of the incident. *State v. Stairs,* 143 Me. 245, 60 A.2d 141 (1948) (elapsed time four hours); *People v. Abbott,* 101 Cal. App. 2d 200, 225

P.2d 283 (1950) (elapsed time three hours); *People v. Martinez,* 38 Cal. 2d 556, 241 P.2d 224 (1952) (elapsed time one and a half hours). In *People v. Decasaus,* 150 Cal. App. 2d 274, 309 P.2d 835 (1957), a blood specimen was taken three hours after a collision and the California court held the evidence admissible. See cases collected Donigan, supra, 1961 supplement, pages 20–21. In this regard, it should be noted that those states having statutes limiting the admissibility of blood tests taken subsequent to an accident usually provide that the test is admissible if taken any time within two hours of the accident or arrest. Donigan, supra, 42–43, 1961 supplement, 21.

The appellant argues that there is no evidence to contradict his statement as to the time of consumption of the alcohol. It is submitted on the basis of the facts indicated above that his testimony was in fact contradicted. Even so, however, it is clear that the jury need not believe the appellant. In *Commonwealth v. Hartman,* 179 Penn. Supr. 134, 115 A.2d 820 (1955), the same argument was urged before the court. In rejecting it, the court noted:

> "The only direct evidence as to the kind and quantity of intoxicants consumed by the defendant and the time spent in drinking at the By-bar is in the testimony of the defendant himself and that of his companion. They both said that they arrived at the tavern after 3:00 P.M. when the defendant drank 'two beers' and no more. The fact that the Commonwealth was not in position to prove that the defendant came to the tavern earlier in the day or that he consumed more than two beers while there was not controlling on the question of defendant's guilt. Defendant's credibility and that of his witness were for the jury and the weight ascribed to their testimony may have had a determining effect on the result. The opinions of the police officers who

> examined defendant at the City Hall immediately after the arrest, to the effect that in their opinion he then was intoxicated went to the credibility of defendant and his witness. And clearly defendant's condition within one hour after his arrest, as shown by the Intoximeter test on testimony which has not been questioned, was competent and relevant and was some evidence on the question of whether he was under the influence of intoxicating liquor while driving his automobile at the time of the collision. The weight of the evidence based on the rest of course was for the jury."

Although the case was reversed in *Commonwealth v. Hartman,* 383 Penn. 461, 119 A.2d 211, it was reversed only on the basis that the state could not appeal. The statement quoted on page 24 of the appellant's brief in fact is not a statement of the appellate court, but the reasons which the trial court gave in granting a new trial from which the state appealed. Therefore, the case before the Pennsylvania court in 115 A.2d 820 (1950) is the highest appellate determination on the issue which is now urged by appellant and that determination was adverse to appellant's present contentions. Under the circumstances of this case, it is apparent that the evidence as to the blood alcohol test was a matter for the jury's consideration and since the jury is the ultimate judge of the credibility of a witness, the trial court did not commit error in allowing the jury to weigh the blood alcohol test along with the other facts against the appellant's claims. *State v. Moore,* 111 U. 458, 183 P.2d 973; *State v. Sullivan,* 6 U.2d 110, 307 P.2d 212.

POINT III

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTION TO DISMISS AT THE CONCLUSION OF THE STATE'S CASE; AND IN ANY EVENT, THE APPELLANT HAVING GONE FORWARD WITH HIS OWN CASE HAS WAIVED HIS RIGHT TO OBJECT.

The appellant contends that the trial court should have dismissed the State's case at the end of the presentation of its evidence because there was insufficient proof that the appellant was guilty of the offense. It is submitted that there is no merit to that contention. The evidence presented by the State showed that the appellant drove erratically and in a manner which would support an inference that he was operating a motor vehicle while intoxicated. Subsequent to the accident, Mr. George Golightly detected the odor of alcohol on the appellant's breath. This, when coupled with his previous driving, would tend to support a conclusion that the appellant was drunk. The appellant told police officers that he either fell asleep or passed out. This would tend to evidence a belief on the appellant's part that he had consumed sufficient alcohol to cause him to pass out. This supports a reasonable inference that the appellant was drunk at the time he drove his vehicle over into the lane of traffic in which the collision occurred, resulting in the death of Fleming Christensen. Finally, the appellant's blood alcohol level of .193, when measured against the statutory presumptions set out in 41–6–44, Utah Code Annotated 1953, would tend to support the conclusion that the appellant was driving his vehicle while intoxicated and driving it in such a manner to negligently cause the death of the charged deceased. Although none of the facts standing alone may in and of themselves be sufficient to warrant the jury in convicting, the totality of the facts conclusively

provide a basis for the jury's result. Further, even assuming for the sake of argument that the trial court erred, the appellant did not rely upon the State's evidence alone but went forward with his own evidence and the appellant himself admitted the consumption of alcohol and did so under circumstances which tended to impeach his credibility, further supporting a conclusion that the appellant was drunk at the time of the accident. Consequently, the appellant has waived any claim of error for the trial court's failure to dismiss at the end of the State's case.

In Wigmore, *Evidence,* § 2496, it is stated:

> "Conversely, however, he cannot take advantage of the judge's *original erroneous refusal* to direct a verdict for insufficiency at the time of the first motion, (a) if he does *not renew* the motion at the close of all the evidence, or (b) or if at the time of the final motion the ruling *correctly refuses* to order a verdict for insufficiency; for the Court is at that time entitled to decide upon a survey of the whole evidence; and this survey naturally renders any prior error immaterial. * * *"

In the instant case, the trial court at the end of the presentation of all the evidence correctly refused to dismiss. This being so, the appellant is in no position to claim error. In *State v. Denison,* 352 Mo. 511, 178 S.W.2d 449 (1944), the court said:

> "Since appellant did not stand on it (first demurrer) but presented evidence in his own behalf, the trial court was bound to take the latter evidence into consideration insofar as it helped the State's case, in ruling on the second demurrer at the close of the whole case."

Since the appellant chose to go forward with his case, the only question for this court is whether the evidence at the

time of submission of the case to the jury was such that the jury could reasonably conclude the defendant's guilt. Since the evidence is clearly sufficient to support the finding of the appellant's guilt, there is no merit to his third point of error.

CONCLUSION

The evidence in this case is strong and direct, pointing to the guilt of the appellant. The issues claimed for reversal on appeal are incidental matters primarily within the discretion of the trial court. The posture of the case, both at trial and on appeal, is such that this court has no other alternative but to affirm.

Respectfully submitted,

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant Attorney General

State Capitol
Salt Lake City, Utah

Attorneys for Respondent